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Beverly Smith

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ATTORNEYS FOR APPELLEE:

STEVE CARTER
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**IN THE
COURT OF APPEALS OF INDIANA**

No. 49A02-0801-CR-28

Appellee-Plaintiff.

APPEAL FROM THE MARION COUNTY SUPERIOR COURT CRIMINAL DIVISION - 20
The Honorable William E. Young, Judge
Cause No. 49G20-0203-FA-64680

July 29, 2008

FRIEDLANDER, Judge

Keith Smith appeals the revocation of his probation. The State concedes that the revocation should be reversed and the cause remanded for a proper evidentiary hearing.

We reverse and remand.

Following a conviction for class B felony possession of cocaine on May 28, 2003, Smith was sentenced to twenty years in prison, with fourteen years suspended and two years of probation. Smith began serving his term of probation on January 19, 2005. Supervision of his probation was subsequently transferred to Illinois.

On May 10, 2006, the State filed a notice of probation violation. The notice was amended on December 12 to include, among other things, the following allegation: “[O]n or about 2/10/2006, [Smith] was arrested and charged in Chicago, Illinois with Theft and Escape under case number 06CR0238601. He is currently being held in the Cook County Jail. A Hearing has been set for 12/12/2006.” *Appellant’s Appendix* at 86.

A brief hearing on the alleged violations was held on December 6, 2007. At the hearing, no witnesses were sworn to testify and no evidence was admitted in support of the allegations. Rather, the trial court relied upon a faxed copy of a judgment of conviction from Cook County, Illinois, apparently showing that Smith had been convicted of theft while on probation in this case. The document, however, was never admitted into the record.¹ The court simply read the fax and determined that Smith had violated probation by committing a subsequent offense.

¹ When the State referred to the faxed document at the hearing, Smith objected that it was not a certified copy. The State did not move to admit the document into evidence, and the trial court never ruled upon Smith’s objection.

The court revoked Smith's probation and ordered him to serve the fourteen years previously suspended.

The procedure for revoking probation is governed by Ind. Code Ann. § 35-38-2-3 (West, PREMISE through 2007 1st Regular Sess.). The statute clearly requires an evidentiary hearing at which the State "must prove the violation by a preponderance of the evidence...in open court." I.C. § 35-38-2-3(e). Additionally, a probationer is entitled to certain due process rights prior to the revocation of his probation, including written notice of the claimed violations, disclosure of the evidence against him, an opportunity to be heard and present evidence, the right to confront and cross-examine adverse witnesses, and a neutral and detached hearing body. *State v. Cass*, 635 N.E.2d 225 (Ind. Ct. App. 1994), *trans. denied*.

In the instant case, no witnesses were sworn to testify and no evidence was admitted in support of the allegations contained in the revocation petitions. Rather, as set forth above, the court summarily revoked Smith's probation based upon a faxed document that was not entered into evidence. Moreover, the court did not provide Smith with an opportunity to present evidence on his behalf. This is not the type of probation revocation hearing required by I.C. § 35-38-2-3 and federal due process. *See Dalton v. State*, 560 N.E.2d 558 (Ind. Ct. App. 1990). Therefore, we reverse the revocation of Smith's probation and remand for an evidentiary hearing as required by law.

Judgment reversed and cause remanded.

KIRSCH, J., and BAILEY, J., concur